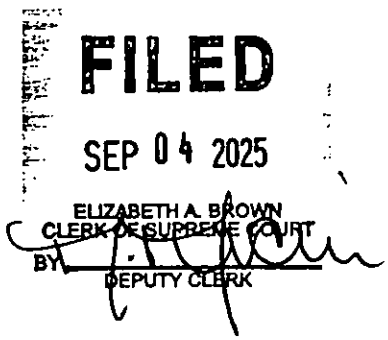
IN THE SUPREME COURT OF THE STATE OF NEVADA

LAYNE OLSON, INDIVIDUALLY, AND AS ASSIGNEE OF ELIZABETH MCFETRIDGE,
Appellants/Cross-Respondents,
vs.
MID-CENTURY INSURANCE COMPANY; FARMERS INSURANCE EXCHANGE; FARMERS GROUP, INC., DBA FARMERS UNDERWRITERS ASSOCIATION; AND FARMERS INSURANCE GROUP OF COMPANIES,
Respondents/Cross-Appellants.

No. 86892



ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal and cross-appeal from a district court judgment, pursuant to a jury verdict, in an action for insurance bad faith, breach of contract, and related claims. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

In January 2014, Elizabeth McFetridge caused a car accident and was sued for personal injuries by appellant/cross-respondent Layne Olson. McFetridge held an auto insurance policy with respondent/cross-appellant Mid-Century Insurance Company (MIC), which was contracted through respondent/cross-appellant the Farmers Insurance Group of Companies (FIGC). FIGC includes respondent/cross-appellant Farmers Insurance Exchange (FIE) and is managed by respondent/cross-respondent Farmers Group, Inc. (FGI) (collectively Farmers). Farmers declined coverage and refused to defend McFetridge in the lawsuit on the grounds that she failed to notify them about her purchase of a replacement vehicle

following a prior accident in May 2013, a purported requirement for maintaining coverage. McFetridge took no steps to defend against Olson's lawsuit, and a default judgment was entered against her for approximately $3.2 million.

Olson later obtained a judicial assignment of rights and, on McFetridge's behalf, filed a lawsuit against Farmers for insurance bad faith, breach of contract, negligent misrepresentation, unfair insurance practices, and related claims. A jury found Farmers liable for breach of contract and unfair insurance practices but found for Farmers on the remaining claims. At the time of the verdict, damages against McFetridge had grown to $4,274,557.91, which included the original default judgment amount plus accrued interest. The jury found that McFetridge breached her duty to mitigate those damages, and the district court reduced total damages to $142,500, representing the total amount of unavoidable damages as determined by the jury. The jury also assessed $500,000 each in punitive damages against MIC, FIE, and FGI.

Olson appeals, arguing that much of the jury's verdict must be reversed or, alternatively, that a new trial is required. In particular, he contends (1) the jury's determination on the mitigation-of-damages defense requires reversal; (2) a partial new trial is warranted based on various issues pertaining to Olson's mitigation defense, as well as the jury's verdict on his bad-faith claim; (3) the district court erred in declining to award post-offer interest on punitive damages; and (4) the district court erred in granting summary judgment for FGI on Olson's claim for unfair insurance practices.[1] Farmers cross-appeals, arguing (1) the district court erred in its

[1]To the extent that Olson also argues that the jury's verdict on his negligent misrepresentation claim was improper, we are not persuaded that

calculation of compensatory damages, (2) the district court erred in its calculation of punitive damages, and (3) Farmers is entitled to summary judgment on the breach of contract claims. We first consider Olson's appeal and then consider Farmers' cross-appeal.

Olson's appeal

1. *The jury's determination on the mitigation of damages defense does not require reversal*

At trial, Farmers put forth the affirmative defense of failure to mitigate damages. The duty to mitigate damages requires a party suffering a loss or injury to take reasonable steps to mitigate damages. *See Automatic Merchandisers, Inc. v. Ward*, 98 Nev. 282, 284, 646 P.2d 553, 554 (1982). The jury found that McFetridge breached this duty, and that if she had spent $42,500 to defend against the lawsuit, she could have avoided all but $100,000 of the default judgment. Olson asserts that the district court erred in denying his motion and renewed motion for judgment as a matter of law because Farmers presented insufficient evidence supporting its mitigation defense. We review a district court's denial of a motion and renewed motion for judgment as a matter of law de novo. *Motor Coach Indus., Inc. v. Khiabani*, 137 Nev. 416, 419, 493 P.3d 1007, 1011 (2021). A jury's factual determinations will be upheld if supported by substantial evidence. *Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 1261, 969 P.2d 949, 958 (1998).

Olson first argues the verdict must be reversed because there was no evidence to show that McFetridge could have afforded $42,500 in

---

relief is warranted as Olson does not specify what type of relief he is seeking from this court or cogently explain why any such relief should be granted. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court will not consider an argument that is not cogently argued).

defense costs necessary to defend against the lawsuit. But Farmers was not required to prove that McFetridge could have afforded the $42,500 amount. To succeed in its defense, Farmers was only required to show that McFetridge failed to take reasonable steps to mitigate damages. Farmers provided substantial evidence that McFetridge took *no steps* to avoid the default judgment. Whether and how much those steps would have reduced damages was a question of fact for the jury. They saw the evidence and weighed McFetridge's credibility regarding her ability to negotiate or finance assistance in defending against the lawsuit. We decline to disturb the jury's findings as the jury was properly instructed on the mitigation defense, and substantial evidence supports its findings. *See Dillard Dep't Stores, Inc. v. Beckwith*, 115 Nev. 372, 380, 989 P.2d 882, 887 (1999) (stating that where the jury is properly instructed on the duty to mitigate, the question is one for the jury and beyond our scope of review).

Olson further argues that the evidence established that McFetridge was unaware of Farmers' breach until after default judgment was entered. *See Home Indem. Co. v. Lane Powell Moss & Miller*, 43 F.3d 1322, 1329 (9th Cir. 1995) ("The duty to mitigate damages does not arise until the party upon whom the duty is impressed is aware of facts making the duty to mitigate necessary."). McFetridge testified that she was unaware of the lawsuit until after default judgment was entered against her. But Farmers provided substantial evidence that she was sent communications prior to entry of default judgment placing her on notice of the lawsuit and, by extension, the potential breach by Farmers. Once again, the jury evaluated McFetridge's credibility, weighed the evidence, and found that McFetridge was aware of facts making the duty to mitigate necessary prior to the entry of default judgment. We therefore decline to

disturb the jury's findings, and we conclude the district court did not err in denying Olson's motion for judgment as a matter of law on this issue.

2. No new trial is warranted

Olson argues that the district court abused its discretion in denying his motion for a partial new trial on both the mitigation defense and the bad faith verdict. "The decision to grant or deny a motion for a new trial rests within the sound discretion of the trial court, and this court will not disturb that decision absent palpable abuse." *Edwards Indus., Inc. v. DTE/BTE, Inc.*, 112 Nev. 1025, 1036, 923 P.2d 569, 576 (1996).

a. The mitigation defense

Olson first asserts that a new trial on the mitigation defense is warranted because the district court provided the jury with an instruction that was irrelevant and tended to confuse or mislead the jury. This court reviews a district court's decision to give a particular instruction for an abuse of discretion. *D & D Tire, Inc. v. Ouellette*, 131 Nev. 462, 470, 352 P.3d 32, 37 (2015). Reversal of a verdict is warranted based on an erroneous jury instruction when prejudicial error has been established. *Cook v. Sunrise Hosp. & Med. Ctr., LLC*, 124 Nev. 997, 1005, 194 P.3d 1214, 1219 (2008).

The district court instructed the jury, pursuant to NRS 483.390, that McFetridge had a statutory duty to notify the Department of Motor Vehicles of her change of address. We conclude this instruction was relevant to Farmers' mitigation defense, as Farmers was required to demonstrate that McFetridge's own inactions contributed to the damages resulting from Farmers' breach. Olson has not shown that the instruction was unfairly prejudicial or that it confused or misled the jury. Therefore, the district court did not abuse its discretion in denying a new trial on this basis.

Olson further argues that Farmers' counsel advocated for jury nullification, requiring a partial new trial on the mitigation of damages defense. "Whether an attorney's comments are misconduct is a question of law, which we review de novo; however, we will give deference to the district court's factual findings and application of the standards to the facts." *Lioce v. Cohen*, 124 Nev. 1, 20, 174 P.3d 970, 982 (2008) (footnote omitted).

Olson argues that counsel made several arguments encouraging the jury to decide the case based on emotion or prejudice, rather than the law. Olson failed to object to the statements at issue below. After reviewing the comments for plain error, we conclude they did not rise to a level necessitating a new trial. *See id.* at 7, 174 P.3d at 974 (explaining this court may review "unobjected-to misconduct" for plain error). Importantly, Olson has failed to demonstrate that the comments at issue had a prejudicial effect on the verdict. Therefore, the district court did not abuse its discretion in denying Olson's motion on these grounds.[2]

b. The bad faith verdict

Olson argues the district court erred in denying his motion for a partial new trial on the claim of bad faith because the court made multiple errors affecting the verdict. First, Olson argues that the district court abused its discretion by instructing the jury that a genuine coverage dispute bars a finding of bad faith refusal to defend—i.e., the genuine dispute doctrine. The instruction stated, "[a]n insurer does not act in bad faith if a genuine dispute exists in good faith as to the existence of coverage under the policy."

---

[2]We have considered Olson's other arguments related to his motion for a partial new trial on the mitigation defense and conclude the district court did not commit any error warranting reversal.

This court has never explicitly adopted the genuine dispute doctrine, though federal courts in Nevada have applied it consistently. *See, e.g.*, *Basu v. Mass. Mut. Life Ins. Co.*, No. 2:20-cv-01432-JCM-BNW, 2023 WL 1765676, at *5 (D. Nev. Feb. 3, 2023). But the doctrine is not a separate rule of law; it is subsumed within reasonableness requirements for bad faith. Under our caselaw, to establish a claim of insurance bad faith, the plaintiff must show that the insurer acted unreasonably and knew that it acted unreasonably. *See Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 1258, 969 P.2d 949, 956 (1998) ("Bad faith is established where the insurer acts unreasonably and with knowledge that there is no reasonable basis for its conduct." (quoting *Guaranty Nat'l Ins. Co. v. Potter*, 112 Nev. 199, 206, 912 P.2d 267, 272 (1996)). Given this, a genuine dispute over the insurer's obligations—i.e., a reasonable belief on the part of the insurer that it has no obligations with regard to the insured—necessarily defeats a claim of bad faith.

Olson does not argue that the genuine dispute doctrine instruction was erroneous regarding Olson's claim of bad faith refusal to indemnify. Instead, Olson argues that the genuine dispute doctrine simply does not apply to duty to defend cases. *See, e.g.*, *Jacobs v. Liberty Surplus Ins. Corp.*, No. 3:21-cv-01687-WHO, 2021 WL 4243396, at *8 (N.D. Cal. Sept. 17, 2021) (determining genuine dispute doctrine not applicable to duty to defend cases because, under California law, "insurers have a duty to defend even whe[re] there is [only] a *potential* for indemnity"). While the doctrine has primarily been applied in cases in which an insurer fails to indemnify, some courts have also applied the doctrine to duty-to-defend cases. *See, e.g.*, *Lunsford v. Am. Guar. Liab. Ins. Co.*, 18 F.3d 653, 656 (9th Cir. 1994). As explained in *Lunsford*, if an insurer has a reasonable belief that it has no duty to defend based on a reasonable construction of its

contract, it cannot be liable for bad faith refusal to defend. *Id.* Here, the district court's instruction provided that a genuine dispute over *coverage* defeats a claim of bad faith generally. While a more precise way of stating the rule may have provided that a genuine dispute over coverage defeats a claim of bad faith refusal to indemnify and a genuine dispute over an insurer's obligation to defend defeats a bad faith refusal to defend, we conclude that when looking at the relevant instructions overall, the jury was sufficiently and fairly instructed. *See D & D Tire*, 131 Nev. at 471, 352 P.3d at 38 (stating if an instruction is not correct, this court reviews the instruction in the context of all the instructions to determine whether the jury was sufficiently and fairly instructed). Reversal based on a jury instruction is warranted only when "but for the error, a different result might have been reached." *Cook v. Sunrise Hosp. & Med. Ctr., LLC*, 124 Nev. 997, 1006, 194 P.3d 1214, 1219 (2008). Here, the jury was provided with extensive instructions regarding both bad faith refusal to indemnify and bad faith refusal to defend. Olson has not persuaded us that a different result would have been reached on the bad faith refusal to defend claim had the district court provided a more precise instruction on the genuine dispute doctrine as it relates to the duty to defend.

Olson also contends the district court erred in denying multiple motions to compel discovery and in allowing Farmers' witness to testify regarding the court's factual findings in the order denying Olson's motions to compel discovery. "Discovery matters are within the district court's sound discretion, and [this court] will not disturb a district court's ruling regarding discovery unless the court has clearly abused its discretion." *Club Vista Fin. Servs., LLC v. Eighth Jud. Dist. Ct.*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012). This court reviews a trial court's decision to admit evidence

for an abuse of discretion. *M.C. Multi-Fam. Dev., L.L.C. v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 913, 193 P.3d 536, 544 (2008).

The motions at issue were initially resolved by a discovery commissioner, who determined that Farmers complied with all discovery requests regarding the dispute. The district court then allowed a witness to read the discovery commissioner's findings in response to allegations by Olson's counsel that the witness had provided a false affidavit related to the discovery dispute.

Olson's arguments related to this issue are conjectural, and we conclude that the district court did not clearly abuse its discretion in affirming the findings of the discovery commissioner, who thoroughly reviewed the evidence and arguments and came to a reasonable conclusion regarding the dispute. Further, the district court did not abuse its discretion in allowing the witness to testify regarding the discovery commissioner's findings. Importantly, Olson has not demonstrated with clarity how a different result on the bad faith claim might have been reached if the district court had granted the motions or excluded the testimony.

Olson next argues the district court abused its discretion by overruling his objections to testimony from one of Farmers' expert witnesses. "This court reviews a district court's decision to allow expert testimony for [an] abuse of discretion." *Hallmark v. Eldridge*, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008). Olson claims that Farmers' expert witness, Joanna Moore, improperly testified to (1) the reasonableness of certain conduct and MIC employees' then-existing state of mind, (2) the legal meaning or interpretation of a contract, and (3) issues of law. Olson lists six statements by Moore that allegedly fall into one of these three categories of improper testimony. But Olson does not provide cogent argument

explaining how any of the specific statements at issue were inadmissible. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006). We therefore decline to consider the merits of Olson's argument and hold the district court did not abuse its discretion in admitting the testimony.

As a separate affirmative defense, Farmers argued that McFetridge breached her duty to cooperate. Olson contends that the district court erred by denying his motion for summary judgment on this defense and argues that allowing the defense to go to the jury was prejudicial as to the *bad faith claim* because it was simply a way for Farmers to denigrate McFetridge in an attempt to absolve itself of bad faith liability.

This court reviews an order denying summary judgment de novo. *Cromer v. Wilson*, 126 Nev. 106, 109, 225 P.3d 788, 790 (2010). "Summary judgment is appropriate when the pleadings and other evidence establish that 'no genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law.'" *Id.* (quoting *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005)). The district court did not err in denying Olson's motion as there was a genuine issue regarding McFetridge's cooperation. Further, McFetridge's alleged noncooperation—specifically, failing to notify Farmers of her replacement vehicle—was the purported reason why Farmers denied the claim and refused to defend, and thus, was relevant to Olson's bad faith claim. Olson has not demonstrated that any prejudice from Farmers' assertion of the duty-to-cooperate defense outweighed its highly probative value. *Cf.* NRS 48.015 ("'[R]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence."); NRS 48.035(1) ("Although relevant, evidence is not admissible if its probative

value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury.").

Because the district court did not err in its rulings regarding the bad faith claim, it did not abuse its discretion in denying Olson's motion for a partial new trial on that claim.

3. The district court erred in declining to award post-offer interest on punitive damages

Olson argues the district court erred by denying post-offer interest on punitive damages pursuant to NRCP 68(f)(1). Statutory construction presents a question of law that we review de novo. *See Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 368, 252 P.3d 206, 208 (2011). In interpreting a statute, we begin by assessing the statute's plain language. *Webb v. Shull*, 128 Nev. 85, 88-89, 270 P.3d 1266, 1268 (2012).

NRCP 68(f)(1) provides that an offeree who "rejects an offer and fails to obtain a more favorable judgment" must pay "applicable interest on the judgment from the time of the offer to the time of entry of the judgment." The language makes no distinction regarding the type of damages awarded. Accordingly, we have held that "interest on the judgment" as contained in NRS 17.117—the statutory codification of NRCP 68—means "interest on the entire judgment awarded by the jury." *Uniroyal Goodrich Tire Co. v. Mercer*, 111 Nev. 318, 324, 890 P.2d 785, 789 (1995).[3]

Although *Uniroyal* does not discuss punitive damages, it highlights an important distinction between prejudgment interest pursuant to NRS 17.130 and post-offer interest pursuant to the offer-of-judgment rule. *Uniroyal* allows post-offer interest on future damages even though

[3]*Uniroyal* discusses NRS 17.115, which was repealed in 2015 and replaced with NRS 17.117 in 2019. *See*, 2015 Nev. Stat., ch. 442, § 41, at 2569; 2019 Nev. Stat., ch. 57, § 1, at 274-75.

future damages are not awarded prejudgment interest under NRS 17.130. *See id.* at 324, 890 P.2d at 790; *see also Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 865, 124 P.3d 530, 549-50 (2005). This holding makes clear that Nevada law treats prejudgment interest pursuant to NRS 17.130 and post-offer interest pursuant to the offer-of-judgment rule as separate types of interest. Although post-offer interest may be characterized as a *type* of prejudgment interest, *see* (Pickering, J., concurring in part and dissenting in part), it is nonetheless a distinct category of interest whose purpose is not to compensate but to incentivize early settlement, *Uniroyal*, 111 Nev. at 324, 890 P.2d at 790. The fact that post-offer interest runs pre-judgment does not convert it into compensatory prejudgment interest pursuant to NRS 17.130; the punitive purpose of the post-offer interest remains unchanged. As such, "[t]he type of damages ultimately awarded are immaterial to the basic purpose of the statute." *See Uniroyal*, 111 Nev. at 324, 890 P.2d at 790. Awarding post-offer interest on punitive damages is consistent with *Uniroyal* and furthers the purpose of the statute.

The partial dissent on this issue discusses "California's analogous offer-of-judgment scheme, which imposes a prejudgment interest penalty on defendants in personal injury cases who reject a favorable offer of judgment," which the California Supreme Court held does not allow for post-offer interest on punitive damages. (Pickering, J., concurring in part and dissenting in part, at 23 (citing *Lakin v. Watkins Associated Indus.*, 863 P.2d 179, 186 (Cal. 1993))). But the California statute discussed in *Lakin* is not so analogous as the dissent implies. It expressly states that the interest penalty is limited to "damages for personal injury," and the *Lakin* court's holding partially relied on the conclusion that "[p]unitive damages are not damages 'for' personal injury." 863 P.2d at 192 (quoting Calif. Civ. Code § 3291). By contrast, NRCP 68 does not expressly limit the interest

penalty to any specific type of damages.[4] The partial dissent's conclusion that allowing such interest on punitive damages "constitutes an impermissible double penalty" is a policy consideration not tethered to the language of NRCP 68. (Pickering J., concurring in part and dissenting in part, at 24).

In declining to award post-offer interest on punitive damages, the district court erred in relying on *Ramada Inns, Inc. v. Sharp*, 101 Nev. 824, 826, 711 P.2d 1, 2 (1985), which discusses *prejudgment interest* pursuant to NRS 17.130, rather than *post-offer interest* pursuant to NRCP 68. As already established, the two types of interest are distinct in character and purpose, and our conclusion today therefore does not conflict with our holding in *Ramada Inns*. Accordingly, we reverse the district court's decision and remand for further proceedings regarding post-offer interest.

4. *FGI is not subject to unfair insurance practices liability as attorney-in-fact*

Olson brought claims for unfair insurance practices against all respondents pursuant to NRS 686A.310. The district court granted summary judgment on this claim in favor of FGI because it found that FGI was not an insurer or insurance company for purposes of the statute. Olson argues on appeal that this was an erroneous interpretation.

---

[4]Other courts interpreting closer analogues to NRCP 68 have found through a plain-reading analysis that their offer-of-judgment rules allow for post-offer interest on the entire judgment, including punitive damages. *See, e.g., Garrison v. Target Corp.*, 869 S.E.2d 797, 808 (S.C. 2022) (holding that post-offer interest on "the amount of the verdict or award" entitles a plaintiff to interest on "the entire amount of the verdict, including punitive damages" (quoting SCRCP 68(b) and S.C. Code Ann. § 15-35-400(B))).

We have previously interpreted NRS 686A.310 as applying only to an "insurer." *Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 1265, 969 P.2d 949, 960 (1998). Olson relies on California caselaw to argue that an attorney-in-fact for an insurance company is subject to unfair insurance practice liability. Olson's reliance is misplaced, as the California code expressly provides for such liability. *See* Cal. Ins. Code § 1281. Because we have held that NRS 686A.310 applies only to insurers, FGI, which is not an insurer in the state of Nevada, is not subject to liability under the statute. Therefore, the district court properly granted summary judgment on this issue.

Farmers' cross-appeal

1. The district court did not err in calculating compensatory damages

Farmers moved for judgment as a matter of law pursuant to NRCP 50(a) and renewed that motion pursuant to NRCP 50(b). The district court denied both motions. Farmers cross-appeals from the denial of those motions, arguing the district court erred in its calculation of compensatory damages based on the verdict form. Once again, we review a district court's denial of such motions de novo. *Motor Coach Indus., Inc. v. Khiabani*, 137 Nev. 416, 419, 493 P.3d 1007, 1011 (2021).

Farmers argues that the district court erred in its calculation of compensatory damages based on the answers provided by the jury on the verdict form.[5] "The district court's decisions concerning special interrogatories and verdicts are reviewed for abuse of discretion." *Lehrer*

[5]Though we are concerned by the district court's decision to provide the jury with a seemingly flawed special verdict form over the objections of Farmers, Farmers does not challenge that decision, and any argument for reversal of the verdict based on the verdict form itself is waived.

McGovern Bovis, Inc. v. Bullock Insulation, Inc., 124 Nev. 1102, 1110, 197 P.3d 1032, 1037 (2008).

Farmers asserts that based on the answers provided on the verdict form, the district court was required to subtract $4,274,557.91—the amount the jury determined McFetridge could have avoided through mitigation efforts—from $100,000—the amount of total damages as determined by the jury—for a total of *negative* $4,174,557.91 in compensatory damages. This reading of the verdict form is unreasonable. We acknowledge that the verdict form called for the jury to determine what it believed to be McFetridge's *gross* damages, i.e., the default judgment amount with accrued interest, in response to special interrogatory 10. But "[c]ourts must make an effort to harmonize seemingly inconsistent special verdict answers and must interpret them in a consistent way if possible." *Motor Coach Indus.*, 137 Nev. at 425, 493 P.3d at 1015. The only consistent way to interpret the verdict form is that the jury entered what it believed to be McFetridge's *net* damages—after reducing the default judgment by the amount McFetridge could have avoided through mitigation efforts—in response to special interrogatory 10. The district court did not abuse its discretion in interpreting the verdict form in this manner.

Farmers further argues that the district court erred by including $42,500 as recoverable damages—the amount the jury determined McFetridge would have expended to mitigate her damages. This argument is inconsistent with Farmers' own briefing before this court and in the district court below, in which Farmers urged the district court that "the correct reduction of damages is in the entire amount the jury found McFetridge could have avoided with reasonable diligence ($4,274,557.91), less the amount a defense would have cost her ($42,500)." The district court here did just that. In interpreting the verdict form in a logical manner, the

district court concluded the jury had determined that all but $100,000 of the total damages of $4,374.557.91 could have been avoided, but only at an expense of $42,500, for a total of $142,500 unavoidable damages. The district court therefore did not err in denying Farmers' renewed motion for judgment as a matter of law on this issue.

2. The district court did not err in calculating punitive damages

As noted, the jury assessed $500,000 each in punitive damages against MIC, FGI, and FIE. Farmers argues that these awards must be stricken in their entirety because there was insufficient evidence presented at trial to support the notion that Farmers acted with "oppression, fraud or malice, express or implied." NRS 42.005(1). But Farmers waived this claim by failing to renew the argument in its NRCP 50(b) motion. Farmers contends that the argument was not waived because it briefed the issue in its pretrial motion for summary judgment at the close of discovery on the issue of punitive damages. However, Farmers' instant argument is that there was insufficient evidence presented at trial for the jury to find malice or oppression, not that there was insufficient evidence supporting the district court's threshold determination that the question of punitive damages may go to the jury. These are distinct arguments. Because the instant argument was not raised in Farmers' renewed motion for judgment as a matter of law, the argument is waived.

Alternatively, Farmers argues the punitive damages awards must be stricken in their entirety because the jury's award represented only contract damages, thereby precluding an award of punitive damages. Farmers asserts that the only logical conclusion from review of the verdict form is that the jury's award of $100,000 represents only contract damages, which may not support punitive damages. *See* NRS 42.005(1). However, the district court interpreted the verdict as supporting punitive damages

resulting from the jury's finding of unfair business practices, which is a tort that may support the imposition of punitive damages. "Special verdict forms should be read in concert with jury instructions." *Motor Coach Indus.*, 137 Nev. at 423, 493 P.3d at 1014. The jury was instructed that to establish a claim for unfair insurance practices, the plaintiff must prove "[t]he violation was a substantial factor in causing plaintiff's damages." Given the jury specifically found Farmers engaged in an unfair business practice based on an instruction that necessitates a finding that the violation was a substantial cause of damages, we conclude the district court did not abuse its discretion by interpreting the special verdict as supporting punitive damages based upon this violation.

In the alternative, Farmers argues that that the punitive damages assessed against FGI must be stricken. We agree. The district court determined that the entities were subject to punitive damages based on their violation of NRS 686A.310. As already established, FGI is not an insurer subject to liability for a violation of this statute, and the district court dismissed that claim against FGI. Because there is no other non-breach-of-contract basis to support an award of punitive damages against FGI, the district court erred in allowing the jury to assess punitive damages against that entity.

Farmers also argues alternatively that the district court misapplied the punitive damages limit contained in NRS 42.005(1)(a), requiring a reduction of punitive damages assessed against the remaining entities. NRS 42.005(1)(a) states that punitive damages may not exceed "[t]hree times the amount of compensatory damages awarded to the plaintiff." In calculating the permissible ratio, a court may include prejudgment interest on compensatory damages, as it is designed to "compensate for the loss of use of money due as damages from the time the

claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress." *West Virginia v. United States*, 479 U.S. 305, 310 n.2 (1987). The total compensatory damages awarded here was $142,500, plus prejudgment interest of $69,690.31, for a total award of $212,190.31. Therefore, the ratio of compensatory damages ($212,190.31) to punitive damages ($500,000 each) is below the 1:3 ratio.[6] Accordingly, the district court did not err in its application of NRS 42.005(1)(a).

3. The district court did not err in denying Farmers' motion for summary judgment

Farmers filed a motion for summary judgment below, arguing that because McFetridge failed to notify Farmers of her replacement vehicle after the May 2013 accident, there was no coverage under the contract, and therefore no breach of contract. The district court denied that motion, and Farmers argues on appeal that the denial was erroneous. Once again, this court reviews an order denying summary judgment de novo. *Cromer*, 126 Nev. at 109, 225 P.3d at 790. Here, because there was a genuine issue as to whether there was coverage under the contract, the district court properly denied Farmers' motion for summary judgment and allowed the jury to determine whether there was coverage.

In sum, we reverse the district court's judgment insofar as it declined to award Olson post-offer interest on the punitive damages award. We also reverse the district court's judgment insofar as it awarded punitive

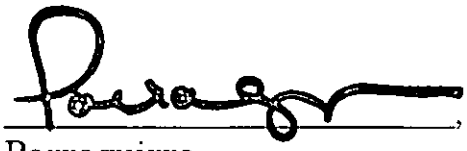
---

[6]As Farmers conceded during oral argument that the ratio is calculated by comparing the entire punitive damage award to the compensatory damage award—as opposed to being calculated separately as to each defendant—we need not address this argument further.

damages against FGI. We affirm the district court's rulings in all other respects. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

_____, C.J.
Herndon



_____, J.
Parraguirre

_____, J.
Bell

_____, J.
Stiglich

CADISH, J., concurring in part and dissenting in part:

While I join Justice Lee's dissent regarding the instructional error requiring reversal as to the insurance bad faith claim in this case, I write separately because I would also reverse the jury's verdict as to the mitigation affirmative defense for separate reasons. Although the jury found that respondents breached their obligations under McFetridge's insurance policy to defend and indemnify McFetridge, and that the resulting damages were $4.3 million, it also found in favor of respondents on the affirmative defense of failure to mitigate. Respondents acknowledge

that the law governing this defense was accurately stated in Jury Instruction No. 70, which includes that it was their burden to prove "[t]hat the damages from the breach [by respondents] *would have been lessened by reasonable diligence and expenditures* on the part of the party seeking damages." (Emphasis added). Both in the briefing in the district court regarding Olson's motion for judgment as a matter of law and in the briefing and arguments in this court, respondents have pointed to evidence in the record that McFetridge failed to even attempt to mitigate her damages and did not try to get assistance from Legal Aid or another pro bono provider or otherwise try to contact Olson's counsel before entry of the default judgment. I acknowledge there is certainly evidence in the record from which the jury could reach this conclusion. However, respondents have not cited, nor has my review revealed, any evidence to support that such efforts "would have . . . lessened" her damages. Indeed, the jury did not find that these services which would not cost McFetridge any money would have actually resulted in mitigation of damages. Instead, the jury found that an expenditure of $42,500 was required to do so. As respondents point out, this is based on testimony from an insurance company representative that this is the amount they would have spent on an attorney to defend the underlying case. Again, respondents have not cited and my review has not revealed any evidence in the record to support a finding that McFetridge could have paid this amount to achieve this mitigation. But such a showing is required to prevail on a mitigation defense, which requires only reasonable expenditures as set forth in the instruction given here. Absent evidence such an expenditure would have been reasonable for McFetridge, the verdict on failure to mitigate is not supported by substantial evidence and must be reversed.

Our decision in *Dillard Department Stores v. Beckwith*, 115 Nev. 372, 989 P.2d 882 (1999), which respondents heavily rely on, is not to the contrary. In that case, where there was testimony concerning the plaintiff's efforts to mitigate her damages from the wrongful termination of her employment and the jury instructions were proper, we concluded that the decision regarding mitigation was for the jury and its determination was supported by substantial evidence in the record. *Id.* at 380, 989 P.2d at 887. In contrast, the jury's decision here that attorney fees of $42,500 was a "reasonable . . . expenditure[]" on the part of McFetridge that "would have . . . lessened" her damages is not supported by substantial evidence—or any evidence at all—and thus must be reversed. I therefore dissent as to this issue.

_____, J.
Cadish

PICKERING, J., concurring in part and dissenting in part:

We held in *Ramada Inns, Inc. v. Sharp*, 101 Nev. 824, 711 P.2d 1 (1985), that punitive damages do not bear prejudgment interest. The reasons for this rule are straightforward. "Prejudgment interest is viewed as compensation for use by defendant of money to which plaintiff is entitled from the time the cause of action accrues until the time of judgment; it is not designed as a penalty." *Id.* at 826, 711 P.2d at 2. Punitive damages, by contrast, *are* a penalty. They do not compensate a plaintiff; rather, they punish the defendant. *Bongiovi v. Sullivan*, 122 Nev. 556, 580, 138 P.3d 433, 450 (2006). As such, until a defendant's liability for and the amount of such damages are determined and judgment entered on that determination,

the plaintiff has no entitlement to punitive damages on which interest could be due. *Ramada*, 101 Nev. at 826, 711 P.2d at 2.

Without overruling *Ramada*, the majority nonetheless awards prejudgment interest on the punitive damages imposed in this case. It does so based on Nevada's offer-of-judgment rule, NRCP 68. Under the heading "penalties for rejection of offer," NRCP 68(f)(1)(B) provides that, "[i]f the offeree rejects an offer and fails to obtain a more favorable judgment . . . the offeree must pay . . . *applicable interest* on the judgment from the time of the offer to the time of entry of the judgment" (emphasis added). Citing *Uniroyal Goodrich Tire Co. v. Mercer*, 111 Nev. 318, 890 P.2d 785 (1995)—a case that did not involve punitive damages—the majority reverses the district court's order denying prejudgment interest on the punitive damages. In doing so, it brushes *Ramada* aside as a case that "discusses *prejudgment interest* pursuant to NRS 17.130, rather than *post-offer interest* pursuant to NRCP 68." Maj. order, p. 13 (emphasis in original).

I do not agree with this reasoning or the result. Post-offer interest *is* prejudgment interest. It runs from the date the offer was served until judgment is entered, NRCP 68(f)(1)(B); *see* NRS 17.117(10)(b), then it becomes part of the total final judgment, on which post-judgment interest accrues until the judgment is paid, NRS 18.120; *see Uniroyal*, 111 Nev. at 325, 890 P.2d at 790. *Ramada*'s clear holding that "prejudgment interest may not be granted by a trial court on punitive damage awards," 101 Nev. at 826, 711 P.2d at 2, thus applies to post-offer interest, which is a form of prejudgment interest.

Uniroyal did not consider punitive damages. It addressed prejudgment, post-offer interest on "future damages." 111 Nev. at 324, 890 P.2d at 789-90. Unlike punitive damages, to which a plaintiff has no entitlement, future damages compensate the plaintiff. But by statute,

prejudgment interest in non-contract actions runs from the date the complaint is filed and served. NRS 17.130(2). Because future damages compensate for post-suit loss, such damages do not ordinarily bear prejudgment interest. *Uniroyal*, 111 Nev. at 324, 890 P.2d at 789-90; *but see Las Vegas-Tonopah-Reno Stage Line, Inc. v. Gray Line Tours of S. Nev.*, 106 Nev. 283, 290, 792 P.2d 386, 390 (1990) (allowing prejudgment interest on future damages where the plaintiff proves the damages were suffered after serving the complaint but prior to judgment, the date they were incurred, and their amount). Despite the general rule against prejudgment interest on future damages, *Uniroyal* applied the post-offer interest penalty in NRS 17.115(4)(b) (now NRS 17.117(10)(b); *see* NRCP 68(f)(1)(B)) to the future damages component of a judgment against a defendant who rejected a favorable offer of judgment. 111 Nev. at 324, 890 P.2d at 790. It did so because it deemed the policy underlying the offer-of-judgment statute, which is to incentivize early settlement, paramount to the general rule against prejudgment interest on future damages. *Id.*

It is a mistake, I submit, to extend *Uniroyal* and apply Nevada's offer-of-judgment interest penalty to punitive damages. The California Supreme Court's decision in *Lakin v. Watkins Associated Industries*, 863 P.2d 179 (1993), is instructive. *Lakin* considered California's analogous offer-of-judgment scheme, which imposes a prejudgment interest penalty on defendants in personal injury cases who reject a favorable offer of judgment. *Id.* at 186 (citing Cal. Civ. Code § 3291 and Cal. Civ. Proc. Code § 998).[7]

---

[7]Similar to *Uniroyal*, California applies its offer-of-judgment interest penalty to future damages. *Deocampo v. Ahn*, 125 Cal. Rptr. 2d 79, 91–92 (Ct. App. 2002), *as modified on denial of reh'g* (Sept. 30, 2002).

While California's offer-of-judgment interest penalty applies to personal injury claims generally, *Lakin* limited it to compensatory damages and held the penalty did *not* apply to punitive damages. *Id.* at 191-92. To hold otherwise would give a "windfall to the plaintiffs," *id.* at 192, and conflict with the policy underlying punitive damages, which is to punish, not to compensate, *id.* at 190-91. The court also noted that, "[a]ny connection there might be between the availability for prejudgment interest on punitive damages and the statutory purpose of providing an incentive to settle is too attenuated and speculative to be dispositive." *Id.* at 191.

Awarding post-offer interest on the punitive damages award constitutes an impermissible double penalty. Consistent with *Ramada* and *Lakin*, I would hold that NRCP 68(f)(1)(B)'s reference to "applicable interest" does not provide for prejudgment, post-offer interest on punitive damages. While I dissent as to that issue, I otherwise join the majority's disposition.

Pickering, J.
Pickering

LEE, J., with whom CADISH, J. agrees, concurring in part and dissenting in part:

While I concur with most of the majority's holding, I disagree with its conclusion regarding the bad faith jury instruction. The district court incorrectly instructed the jury that an insurer is not liable for bad faith refusal to defend if there is a dispute over coverage. Because the duty to defend and the duty to indemnify are materially different, I believe there should have been separate instructions for each. While the instruction was

correct with regard to MIC's duty to indemnify, it did not correctly state the rule as applied to the duty to defend.

We have held that the duty to defend is much broader than the duty to indemnify. *See United Nat'l Ins. Co. v. Frontier Ins. Co.*, 120 Nev. 678, 686, 99 P.3d 1153, 1158 (2004). The duty to indemnify arises when there is *actual* coverage under an insurance policy, while the duty to defend arises when there is a *potential* for coverage based on the allegations in a complaint. *Id.* at 686-87, 99 P.3d at 1158. An insurer has a duty to defend "whenever it ascertains facts which give rise to the potential of liability under the policy." *See id.* at 687, 99 P.3d at 1158 (quoting *Gray v. Zurich Ins. Co.*, 419 P.2d 168, 177 (Cal. 1966)). The purpose behind this broad definition is to prevent insurers from avoiding their obligation to defend the insured without at least investigating the facts behind a complaint. *Id.*

As the majority acknowledges, a genuine dispute over coverage defeats a claim of bad faith refusal to indemnify, but such a genuine dispute over coverage simultaneously indicates that there *is* a *potential* for coverage, and thus, does *not* automatically defeat a claim of bad faith refusal to defend, instead supporting such a claim. Jury instructions 31 and 32 provide separate instructions on the duty to defend and the duty to indemnify, but only in the context of the parties' contractual obligations. Jury instruction 55, which precludes *any* finding of bad faith by the insurer when there is a genuine dispute over coverage, should have also drawn that distinction. Because the district court determined as a matter of law that there was a potential for coverage, the jury could have found that MIC acted in bad faith by refusing to defend if provided with accurate instructions regarding this separate theory of liability. I believe that the failure to distinguish between the duty to defend and the duty to indemnify in jury instruction 55 could have impacted the outcome of the trial, thus

warranting a new trial on the bad faith claim. *Martinez v. State*, 140 Nev., Adv. Op. 70, 558 P.3d 346, 352 (2024) (concluding that legal error in a jury instruction warrants reversal only if a different result would be likely, absent the contested instructions). Accordingly, the district court abused its discretion by improperly instructing the jury and I must respectfully dissent on this issue.

_____, J.
Lee

I concur:

_____, J.
Cadish

cc: Hon. Mark R. Denton, District Judge
Paul M. Haire, Settlement Judge
Vannah & Vannah
The Feldman Firm, P.C.
Lemons, Grundy & Eisenberg
Eighth District Court Clerk